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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 14

GENERAL MOTORS LLC,

and

CHARLES ROBINSON, an individual

Cases 14-CA-197985, 14-CA-208242

**BRIEF OF WEINBERG, ROGER &
ROSENFELD AS AMICUS CURIAE**

Weinberg, Roger & Rosenfeld is one of the largest law firms in the country representing labor organizations. It has an extensive practice before the Agency and in the courts relating to actions of the Agency. See 29 U.S.C. section 160(e) and (f). The firm is familiar with speech issues and the First Amendment. See, *Rosenfeld v. New Jersey*, 408 U.S. 902 (1972). The firm submits this short brief to address certain points:

1. The level of civil discourse has become more contentious, disrespectful, ill-mannered, rude and offensive since Donald Trump took office. His homophobic, racist, gender-biased statements and rants have created a level of public speech and private discourse that is unfortunate. This Board cannot issue a decision without taking into account what Trump and his supporters have done and said. For examples of Trump's rants. See Exhibit A. When he and his supporters first chanted "Lock Her Up" and have continued to chant that same phrase, the Board cannot expect workers in a workplace situation to be more civil and more polite. Trump has set a

low bar. If employees were to chant “Lock Her Up” referring to an owner or supervisor that should likewise be protected.

2. The Supreme Court has made it clear that the government can only regulate the content of speech if it meets the strict scrutiny standard. See, e.g., *Iancu v. Brunetti*, No. 18-302 (June 24, 2019). Any consideration of the Board’s heightened regulation of speech must take into account the fact that the Supreme Court in *Iancu v. Brunetti* disapproved of an effort to regulate the use of “F.U.C.T.” by the Patent and Trademark Office. If the government cannot limit the use of that phraseology, it is hard for the Board to come up with a rationale for allowing employers to limit employee speech. Invariably there will be decisions of the Board which implicate First Amendment and section 29 U.S.C.158(c). If employer speech is protected by Section 8(c) so should employee speech be protected.

3. The *Atlantic Steel*, 245 NLRB 814 (1979) factors have worked reasonably well. However, in today’s climate, the Board should modify those factors to require the employer that disciplines an employee to prove that it has uniformly enforced and promulgated whatever rules it applies in the workplace. Simply establishing that there is a written handbook policy is insufficient. Ultimately through subpoenas the General Counsel can seek through subpoenas emails and electronic communications which will reveal the use of rude and offensive language. Some of these exchanges will appear on company provided email and other electronic media. See. *Purple Communications*, 361 NLRB 1050 (2014).

4. *Plaza Office Center*, 360 NLRB 972 (2014) is illustrative. The comments made by the discriminatee were offensive to the employer. The comments would not be offensive to the workers who were being abused. They were only offensive because they were in response to an unfair labor practice committed by the employer by threatening the employee. More importantly, however, the comments were not heard by any employee or customer, were not disruptive to the business and were, as noted, in response to a campaign by the employer to stop the employee from criticizing the employer’s working conditions. Moreover they were accurate. His comment should be fully protected

5. If the Board decides to tighten up any standards, it will grant an opportunity to employees who are disciplined or discharged for making a comment which the employer concludes to be rude, discourteous or uncivil to defend their speech on discrimination grounds. It will be easy enough for that employee or her/his Union to prove to prove that supervisors and managers have made similar comments or other employees have made similar comments in the presence of such supervisors and managers and have not been disciplined. The Board will open the door to further litigation and, ultimately, greater protection for workers because of discrimination in the enforcement of any overbroad and over-inclusive rules.

6. Any decision by the Board will have to take into account the numerous *Atlantic Steel* cases which have been decided since 1979. The Board will have to indicate which cases have been overruled, modified or otherwise affected. This will be a Herculean task which cannot possibly be done within a reasonable time. See Exhibit B for a short list. Absent such explanation, whatever the Board does will be subject to review in the courts and create further confusion.

7. Many of the Board's recent decisions have been met with expletives from workers and their advocates. Such statements are protected. No Board decision should restrict the right of employees to criticize the government including this agency in the workplace or on social media or anyplace.

8. The Board should decide each of the cases mentioned in the Request for Briefing on its own. To issue broader rules would only be a serious mistake.

Dated: November 12, 2019

Organize & Resist,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD

Attorneys for Amicus Curiae WEINBERG,
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EXHIBIT A

News Reports On Trump Using Profanities/Obscenities

Avi Selk, *'If the president is doing it . . .': How Trump took swearing mainstream*, Wash. Post (Oct. 8, 2019), https://www.washingtonpost.com/lifestyle/style/if-the-president-is-doing-it---how-trump-took-swearing-mainstream/2019/10/04/f0f25096-e6a9-11e9-a6e8-8759c5c7f608_story.html.

Peter Baker, *The Profanity President: Trump's Four-Letter Vocabulary*, N.Y. Times (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/trump-language.html>.

Quotes From Trump Containing Profanities/Obscenities

“And you can tell them to go f**k themselves.” Jacqueline Alemany, *Donald Trump rolls out the expletives at Portsmouth rally*, CBS News (Feb. 5, 2016), <https://www.cbsnews.com/news/donald-trump-rolls-out-the-expletives-at-portsmouth-rally/>.

“If you don't support me, you're going to be so g—damn poor.” Gabby Orr, *'Using the Lord's name in vain': Evangelicals chafe at Trump's blasphemy*, Politico (Aug. 12, 2019), <https://www.politico.com/story/2019/08/12/trump-evangelicals-blasphemy-profanity-1456178>.

“Get that son of a bitch off the field right now.” Bryan Armen Graham, *Donald Trump blasts NFL anthem protesters: 'Get that son of a bitch off the field'*, Guardian (Sept. 23, 2017), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests>.

“I did try and fuck her. . . . I moved on her like a bitch. . . . Look at you, you are a pussy. . . . Grab 'em by the pussy.” *Transcript: Donald Trump's Taped Comments About Women*, N.Y. Times (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> (quotes from conversation between Donald Trump and Billy Bush in 2005).

“Why are we having all these people from shithole countries come here?” Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html

“You know, you had governors and senators, you know they were all good until I beat the shit out of them, O.K.?” *Read Excerpts: The Times Publisher Asks Trump About 'Anti-Press Rhetoric'*, N.Y. Times (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/us/politics/trump-times-publisher-sulzberger-transcript.html?module=inline>.

“It's bullshit. Okay? It's bullshit.” Donald Trump, *Remarks by President Trump at the National Association of REALTORS Legislative Meetings and Trade Expo* (May 17, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-association-realtors-legislative-meetings-trade-expo/>.

“Listen you motherfuckers, we’re going to tax you 25 percent!” Andy Kroll, *Donald Trump’s F-Bomb Attack*, Mother Jones (Apr. 29, 2011), <https://www.motherjones.com/politics/2011/04/donald-trump-vegas-profanity-speech/>.

Twitter

“The Do Nothing Democrats should be focused on building up our Country, not wasting everyone’s time and energy on BULLSHIT, which is what they have been doing ever since I got overwhelmingly elected in 2016, 223-306. Get a better candidate this time, you’ll need it!” Donald Trump (@realDonaldTrump), Twitter (Oct. 2, 2019, 8:48 PM), <https://twitter.com/realDonaldTrump/status/1179422987684077568>.

“So funny to see little Adam Schitt (D-CA) talking about the fact that Acting Attorney General Matt Whitaker was not approved by the Senate, but not mentioning the fact that Bob Mueller (who is highly conflicted) was not approved by the Senate!” Donald Trump (@realDonaldTrump), Twitter (Nov. 18, 2018), <https://twitter.com/realDonaldTrump/status/1064216956679716864>.

“Mitt Romney never knew how to win. He is a pompous ‘ass’ who has been fighting me from the beginning, except when he begged me for my endorsement for his Senate run (I gave it to him), and when he begged me to be Secretary of State (I didn’t give it to him). He is so bad for R’s!” Donald Trump (@realDonaldTrump), Twitter (Oct. 5, 2019), <https://twitter.com/realdonaldtrump/status/1180487139546546182>.

“Every time I speak of the haters and losers I do so with great love and affection. They cannot help the fact that they were born fucked up!” Donald Trump (@realDonaldTrump), Twitter (Sept. 28, 2014), <https://twitter.com/realDonaldTrump/status/516382177798680576>.

EXHIBIT B

Board cases citing *Atlantic Steel*, 245 NLRB 814 (1979), and finding insubordinate behavior/outbursts by employee were protected.

- *Mexican Radio Corp.*, 366 NLRB No. 65 (2018), enf'd 2019 U.S. App. LEXIS 30877 (2d Cir. Oct. 15, 2019)
 - Employees were fired for email replies to a former employee's group email to owners, managers, and certain employees, which contained obscenities and allegations of improper and illegal conduct.
- *Felix Industries, Inc.*, 339 NLRB 195 (2003), enf'd 2004 U.S. App. LEXIS 13793 (D.C. Cir. July 2, 2004)
 - Employee was fired for calling a supervisor a "fucking kid" during a private phone conversation regarding a dispute over a pay differential provided for in the CBA.
- *Roy H. Park Broadcasting of Roanoke, Inc.*, 255 NLRB 229 (1981)
 - Employee was fired for outburst to manager, telling him to "shut up" and that he didn't have to take this "crap."
- *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014)
 - Employee fired for outburst during meeting to discuss concerns re. pay and break policies, calling owner an "F'ing mother F'ing" among other names.
- *Datwyler Rubber & Plastics, Inc.*, 350 NLRB No. 58 (2007)
 - Employee called general manager a devil and said Jesus Christ would punish him in meeting with employees.
- *Stanford Hotel*, 344 NLRB 558 (2005)
 - Employee called general manager a "f---ing son of a bitch" while they were discussing employee's desire to join the collective bargaining unit.
- *Postal Service*, 364 NLRB No. 62 (2016)
 - Employee used profanity and told supervisor she was "being an ass" during meeting to discuss grievances.
- *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016)
 - Employee used profanity in closed meeting with supervisor and made denigrating remarks about supervisors.
- *Alcoa, Inc.*, 352 NLRB 1222(2008)
 - Employee used profane language in a disciplinary meeting, calling a supervisor an "egotistical f---er."
- *Success Village Apartments*, 347 NLRB 1065 (2006)
 - Employee used crude language and yelled at supervisor re. discipline of a unit member.
- *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006)

- Employees were discussing a pending grievance and one employee told another to “mind [her] f—king business.”
- *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006)
 - Employee called his supervisor a “fucking liar.”
- *Cadillac of Naperville*, 368 NLRB No. 3 (2019)
 - Employee called the owner a “stupid jack off.”
- *Greyhound Lines, Inc.*, 367 NLRB No. 123 (2019)
 - Employee used profanities in confrontation with supervisor.
- *Lou’s Transport, Inc.*, 361 NLRB 1446 (2014)
 - Employees used profanity and made derogatory comments about management.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On November 12, 2019, I served the following documents in the manner described below:

BRIEF OF WEINBERG, ROGER & ROSENFELD AS AMICUS CURIAE

- ☒ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 12, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler